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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

NO. 452

GEORGE A. ADAMOS, Petitioner,

v.

NEW YORK LIFE INSURANCE COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

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BRIEF FOR RESPONDENT.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Opinions Below.

The original opinion of the District Court is reported in 5 F. Supp. 278. The opinion of the District Court on the petitioner's application for a rehearing of the case on its merits is reported in 5 F. Supp. 1019. The opinion of the Circuit Court of Appeals is reported in 71 F. (2d) 997.

Statement of the Case.

The petitioner's statement of the case avoids any reference to the facts or merits of the controversy. Consideration of the second major point in our argument necessitates a knowledge of the facts.

In brief, the situation presented is that of a 54-year-old Greek allegedly totally disabled laborer obtaining $20,000 worth of insurance in a mutual life insurance company when he had far advanced cancer of his abdominal organs, which he concealed and from which he died within three months of the issuance of the policies (R. 228-232).

There are four policies involved, each for $5,000. Policies No. 11,773,180 and No. 11,773,181 are dated and were written on April 8, 1932 (R. 228, 254). Policies No. 11,780,717 and No. 11,780,718 are dated and were written on April 19, 1932 (R. 228, 254). The petitioner incorrectly states that each of the four policies is dated April 8, 1932. The first two policies were delivered to Andy Adamos and the first premiums thereon paid by him on April 15, 1932 (R. 122, 228). The last two policies were delivered to the deceased and the first premiums thereon paid by him during the latter part of May or the first part of June, 1932 (R. 125-126, 228).

The medical examination for all four policies was made on April 6, 1932 (R. 48). As a part of that examination, Andy Adamos, the deceased, was asked the following questions and answered them as set opposite each, respectively (R. 48-49, 229-230):

"7. A. Have you ever had any accident or injury or undergone any surgical operation? No

B. Have you ever been under observation or treatment in any hospital, asylum or sanitarium? No

F. Have you gained or lost in weight in the last year? No

8. Have you ever consulted a physician or practitioner for or suffered from any ailment or disease of

C. The Stomach or Intestines, Liver, Kidneys or Bladder? No

10. Have you ever consulted a physician or practitioner for any ailment or disease not included in your above answers? No

11. What physicians or practitioners, if any, not named above, have you consulted or been examined or treated by within the past five years? None."

Adamos signed the application after the answers to the questions had been inserted (R. 47-48, 59, 228). The examining physician testified that a man might have cancer of his internal abdominal organs without his discovering that, in the absence of a truthful history (R. 55).

Each policy contains a provision that the insurance "shall not take effect unless and until the policy is delivered to and received by the applicant and the first premium thereon paid in full during his lifetime, and then only if the applicant has not consulted or been treated by any physician since his medical examination" (R. 219).

Chronologically, Adamos's medical history is as follows: On March 14, 1926, he fell while working for the Jones & Laughlin Steel Corporation and fractured certain of his lumbar vertebrae, the base of his skull, both of his femurs and his left tibia. On account of said injuries, he underwent a surgical operation in a hospital where he was confined from March 14, 1926, until July 8, 1926 (R. 41-42). From the time of said accident until his death, Adamos collected workmen's compensation from the Jones & Laughlin Steel Corporation as for total disability (R. 108-112).

In 1930 or 1931, Adamos was treated six or seven times or more by Dr. Spanos, a fellow countryman, for hypertrophy of the prostate gland (R. 79). These treatments consisted of massage of the prostate gland through the rectum (R. 81). In a letter written by Dr. Spanos on his own stationery and signed by him on February 14, 1933, he stated that these treatments for the enlargement of the prostate gland were during the year 1931 (R. 82-83 and Exhibit "G").

In November, 1931, Dr. Belinky was summoned to Adamos's residence to attend him, found him in bed suffering much pain in his back and abdomen, and prescribed a powerful sedative for him (R. 71-72).

On December 11, 1931, Dr. Owens testified, he was called to Adamos's home, that Adamos was in bed, that he complained of pains throughout his abdomen and that a sedative was prescribed (R. 73-74).

On December 28, 1931, Dr. Owens again was called to where Adamos was living and found him in bed, still in pain and weaker (R. 74-75).

In February, 1932, Adamos again consulted Dr. Spanos. At that time Adamos was complaining of pain in his lower abdomen and said that some doctors had told him that his appendix was diseased and others that he had gallstones "or something like that" (R. 78-79).

On February 9, 1932, Adamos, at the direction of Dr. Spanos, entered the St. Francis Hospital in Pittsburgh (R. 85). An eminent physician who examined Adamos there readily diagnosed Adamos's ailment as a "very advanced" "inoperable carcinoma involving the prostate gland and the surrounding structures" (R. 86-87). This doctor wrote a prescription for Adamos which had plainly written upon it "inoperable carcinoma" (R. 88 and Exhibit "H"). According to this doctor, Adamos was sick enough to have conveyed to the mind of any ordinary person that he was seriously ill (R. 89-90).

While in the St. Francis Hospital, Adamos was also examined by a specialist in genito-urinary diseases, who confirmed the diagnosis of cancer, described it as "far advanced," thought that nothing could be done for Adamos except to alleviate his pain, and predicted that Adamos had only six months to live (R. 95-97).

On February 23, 1932, Dr. Owens was again called to where Adamos was living, found him in bed, in pain and weaker, and made a diagnosis of carcinoma of the rectum or lower bowel (R. 75-76).

On April 18, 1932, Dr. Hadley was summoned to where Adamos was then staying. He found Adamos in bed, suffering very marked pain and groaning, diagnosed the case as one of cancer and prescribed a narcotic to relieve the pain (R. 100).

On April 21, 1932, Adamos entered the West Penn Hospital in Pittsburgh and remained there until April 29 (R. 61). While in that hospital Adamos was examined by at least three doctors (R. 60, 102-103, 106). Adamos told one of these doctors that he had lost fifteen pounds in weight in the four preceding months (R. 61). At this hospital a cystoscopic examination, which consists of the insertion of an instrument into the bladder and is a very uncomfortable procedure, was made (R. 62). The doctors at the West Penn Hospital were of the opinion, in the words of one of them, that Adamos had "inoperable carcinoma of the prostate gland, involving the bladder, with probable extension into the lung" (R. 62, 103). After leaving this hospital, Adamos returned there for deep x-ray and therapeutic treatments until May 11 (R. 106).

On July 6, 1932, Adamos died (Exhibit "T"). According to the official death certificate, death was caused by "carcinoma of sigmoid" of eight months' duration (Exhibit "T," R. 226). The sigmoid is part of the intestines. In the official death certificate, Dr. Owens

stated that he had "attended deceased from March 15, 1932, to July 5, 1932" (Exhibit "T," R. 226).

When the last two policies were delivered to Adamos in the latter part of May or the first part of June, 1932, he did not disclose to the respondent that he had had any ill health or that he had consulted any physicians or that he had been examined or treated in any hospital (R. 127).

It is unquestioned that Adamos could speak and understand considerable English. He migrated to this country when between 15 and 20 years of age (R. 162). According to the age he gave in the application, he was 54 years old in April, 1932 (R. 211, 218). He was therefore in this country for at least 34 years except for his visits to the old country. The last time he came to America was in 1913, so that he was continuously in this country for approximately 19 years before his death (R. 162). All of his negotiations with the agent were in English (R. 133). His conversation with most of the doctors was also in English (R. 98-99, 105). There was evidence that Adamos could speak and understand English as well as or better than any of the Greeks who testified at the hearing, for none of whom an interpreter was used (R. 205). Adamos knew that he had been in the St. Francis Hospital, for he so told his partner (R. [illegible])

The learned Judge who heard the evidence was convinced that the insurance in litigation was procured by a deliberate fraud (R. 233, 242).

ARGUMENT.

Summary.

I.

The procedure below was correct.

1. **The procedure below is supported by the weight of authority.**
2. **There is no adequate remedy at law.**
3. **Sound policy supports the decisions below.**
4. **Section 274(b) of the Judicial Code is constitutional.**

II.

There is no jury question.

I.

The Procedure Below Was Correct.

The question about to be considered is whether under the provisions of Section 274(b) of the Judicial Code the defense of fraud to an action upon an insurance policy may be disposed of according to equitable principles and practice before a judge sitting as a chancellor in advance of the trial by jury of the legal issues, if any, remaining in the case. In the broadest analysis this question resolves itself into two others: one is how that statutory provision should be construed and the other is whether that enactment as construed by the lower courts is constitutional. These two questions will be considered in the order in which they have just been stated.

The construction of Section 274(b) of the Judicial Code adopted by the lower courts in the instant case is

the proper one and should be upheld, we respectfully submit, for the following reasons: (1) it is supported by the weight of authority; (2) it is required by the relevant legal principles; (3) it is needed for the improvement of the administration of justice in civil cases.

The Procedure Below Is Supported by the Weight of Authority.

To the best of our knowledge, there are five cases which involved facts substantially the same as in the case at bar and in which the question now before this Court was decided. They are *New York Life Ins. Co. v. Marotta,* 57 F. (2d) 1038 (C. C. A. 3); *State Life Ins. Co. v. Spencer,* 62 F. (2d) 640 (C. C. A. 5), certiorari denied, 289 U. S. 746; *Phillips-Morefield v. Southern States Life Ins. Co.,* 66 F. (2d) 29 (C. C. A. 5); *Enelow v. New York Life Ins. Co.,* 70 F. (2d) 728 (C. C. A. 3), now pending in this Court at No. 47 October Term, 1934; and *New York Life Ins. Co. v. Miller* (C. C. A. 8), not yet reported. These precedents stand four to one in favor of the decisions of the courts below in the case at bar. The circuits stand two to one in favor of the courts below in this case. Judges Bryan, Foster, Hutcheson, Sibley, Akerman, Buffington, Woolley, Thomson, Davis, Dickinson, Fake, Schoonmaker and McVicar, a total of thirteen judges, have unanimously agreed that the procedure followed in this case is correct. Were all these judges wrong?

In the petitioner's brief (p. 14), the force of the *Marotta* decision is sought to be impaired by the statement that the appellees' brief in that case "entirely ignored" the question here presented. Point III in the appellees' brief in the *Marotta* case reads as follows:

> "The Court correctly denied the motion of the defendant, that the Court, sitting as a Court of

Equity should make a finding of fact and law and enter a decree against the executors of the estate of Andrea Marotta in accordance with the prayers of its equitable defenses."

That heading is followed by argument. The question under consideration was specifically raised by the record in the *Marotta* case and was the turning point in the outcome because it was solely upon the question of hearing the equitable defense that the Circuit Court of Appeals reversed.

In addition to the foregoing cases, others not involving the precise question in which we are interested, but in which the courts, in reasoning toward their decisions, have expressed an opinion upon the question now before this Court, include *Peake v. Lincoln National Life Ins. Co.*, 15 F. (2d) 303, 305 (C. C. A. 8); *New York Life Ins. Co. v. Hurt*, 35 F. (2d) 92 (C. C. A. 8), 41 F. (2d) 392 (D. C., Kan., 2 Div.), 51 F. (2d) 936 (C. C. A. 10); and *New York Life Ins. Co. v. Halpern*, 47 F. (2d) 935, 938 (D. C., W. D. Pa.). Each of those cases involved life insurance alleged to have been procured by materially false answers in the application. The opinion expressed by the court in each of those cases upon the question in which we are interested is in accord with the decree appealed from. In the *Peake* case, a bill in equity had been filed by the insurer to cancel a policy because of fraud by the insured in his answers to questions in the application. The next day after the filing of this bill the beneficiary brought an action at law in a state court upon the policy. The District Court entertained jurisdiction and granted an injunction against further prosecution of the action at law. The Circuit Court of Appeals for the Eighth Circuit affirmed on the ground that no possible injury could occur to the beneficiary through sustaining the equitable jurisdiction, be-

cause the defense of fraud was an equitable one and would be heard by a chancellor without a jury, even if that defense were interposed to an action at law. Upon this point Judge Lewis said (p. 305):

> "No possible injury or detriment can come to Mrs. Peake by staying her action until the equity suit is first disposed of, which will be tried without a jury, as the equitable defense to her law action also would be tried without a jury. *U. P. R. Co. v. Syas, supra; Liberty Oil Co. v. Condon Bank,* 260 U. S. 235, 43 S. Ct. 118, 67 L. Ed. 232. She is being denied no right by the order complained of."

In *New York Life Insurance Co. v. Halpern, supra,* Judge Gibson of the District Court for the Western District of Pennsylvania, in holding that equity had jurisdiction of a bill to rescind a life insurance policy under the circumstances of that case, said (p. 938):

> "And even if all testimony were still available, if the directions of the Circuit Court of Appeals in the *Hurt* case, *supra,* should be followed in respect to the manner of trial, the defensive matter set forth in plaintiff's bill would be heard by the judge as a chancellor, and passed upon by him prior to submission of the case to the jury."

The *Hurt* case (35 F. (2d) 92), referred to by Judge Gibson in the preceding quotation, is in accord with the *Phillips-Morefield* case, *supra.* The directions of the Circuit Court of Appeals for the Eighth Circuit, referred to by Judge Gibson, were followed by Judge Pollock of the District Court for the District of Kansas, Second Division, when the *Hurt* case was remanded back to him: 41 F. (2d) 392. After a hearing before Judge Pollock, sitting without a jury, he entered a decree cancelling the policy there involved on the ground that it had been procured through fraudulent conceal-

ment by the insured of his physical condition and consultations with physicians, as well as of breach of a condition precedent by reason of the insured having consulted a physician between the date of his medical examination for the policy and the date of the delivery of the policy to him. This decree was affirmed upon a second appeal to the Circuit Court of Appeals (51 F. (2d) 936).

The petitioner attempts to distinguish the *Hurt* case on the ground that someone else besides the plaintiff in the lawsuit had an interest in the policy. That other party was the administratrix of the insured's estate. The estate of Andy Adamos, however, has an interest in the insurance now in litigation, because the premiums which Andy Adamos paid would be strictly returnable to his estate and not to the beneficiary designated for the death benefit. The fact that the respondent mistakenly tendered the premiums to the plaintiff when we had not yet learned as much about this controversy as we now know should not, we respectfully submit, change the rules of law. The premiums were paid by Andy Adamos (R. 122, 125-126). Certainly the petitioner did not pay the premiums because he testified that he did not even know that the insurance had been taken out until after his father's death (R. 149). It is clear, therefore, that the estate of Andy Adamos would be entitled to the refund of the premiums and not the petitioner.

There are also many other cases construing Section 274(b) of the Judicial Code. The leading case is *Liberty Oil Co. v. Condon National Bank,* 260 U. S. 235. While not involving life insurance, it is submitted that that case and the lower court cases which have followed it support the decisions below in the instant case in principle. Since the petitioner now relies heavily upon

New York Life Ins. Co. v. Miller from the Eighth Circuit, two other cases from that circuit (not, however, involving life insurance but holding that the defense of fraud in the procurement of a contract is an equitable defense which when introduced under Section 274(b) of the Judicial Code into an action at law, should be disposed of first by a judge without a jury) may be noted. They are *Union Pacific R. R. Co. v. Syas,* 246 Fed. 561, 566, and *Fay v. Hill,* 249 Fed. 415. In the latter case the Circuit Court of Appeals for the Eighth Circuit said (p. 418):

> "But, aside from this, if there had been a transfer to the law side of the court, and the bill treated as an answer to the action at law, if it stated an equitable defense, it would have had to be disposed of by the court, sitting as a chancellor, before the trial of the action at law to a jury; and if upon such a hearing the equitable defense had been sustained there would be nothing left to try to a jury. This was decided by this court in *Union Pacific R. R. Co. v. Syas,* 246 Fed. 561,—C. C. A.—The facts alleged in the complaint make it clearly a case for equitable relief, as it seeks to cancel contracts alleged to have been obtained by fraud and deception, and that the minds of the parties had never met. *Sharon v. Hill* (C. C.), 20 Fed. 1; *Sharon v. Hill* (C. C.), 22 Fed. 28. The cancellation of the contracts would prevent their use in any other action instituted by appellant on these contracts."

American Cyanamid Co. v. Wilson & Toomer Fertilizer Co., 62 F. (2d) 1018, cited by the petitioner, did not involve rescission of a written contract which had been procured by fraud, but only other questions fully cognizable at law, as shown by the two jury trials through which the case had already gone. That was an action at law to recover alleged overcharges in the sale of phos-

phate and the real question in the case was whether the defendant had assumed the obligations of one of the original parties to the contract. There was no difference between the applicable principles at law and in equity in that case. Furthermore, all of the parties who could possibly have any interest in the subject matter were joined in that case, which is not so in the instant case.

Phoenix Mutual Life Ins. Co. v. Bailey, 13 Wall. 616, cited by the petitioner, was expressly distinguished by the Circuit Court of Appeals for the Fifth Circuit in *Phillips-Morefield v. Southern States Life Ins. Co., supra.* That distinction is that the *Bailey* case, as well as *Cable v. United States Life Ins. Co.,* 191 U. S. 288, was decided long before Section 274(b) was added to the Judicial Code. There was no provision in the law when those cases were decided for the introduction of equitable defenses in actions at law. By this, of course, we do not mean that the defense of breach of warranty in a sale could not have been heard at law in a Federal court prior to the adoption of Section 274(b) of the Judicial Code, which is what the query in the petitioner's brief (p. 19) amounts to. While no separate suit in equity may be maintained where there is a plain, adequate and complete remedy at law (28 U. S. C. A. § 384), that is a different question from the one here presented, which is how an equitable defense specifically authorized by a new provision of equal force added to the Judicial Code shall be disposed of. The situation is now different from what it was when the *Bailey* and *Cable* cases were decided in that in the meantime Congress has added Section 274(b) to the Judicial Code, thereby providing the salutary improvement of introducing equitable issues into actions at law. Equitable issues when so introduced should be heard and decided according to equitable principles and practice. The equitable

principle for determining whether such fraud exists as will vitiate a contract differs from the rule at law for actionable fraud in that knowledge of the incorrectness of his statements by the declarant is not necessary in equity in order to have the contract induced by such erroneous declarations cancelled and rescinded. Equitable procedure differs from that at law in that trial by jury is not required. Authority for these assertions will be set forth hereinafter.

It may also be noted that the *Bailey* and *Cable* cases involved insurance policies which contained no incontestable clauses.

Buzard v. Houston, 119 U. S. 347, and *Hipp v. Babin,* 19 How. 271, cited by the petitioner, were decided before Section 274(b) was added to the Judicial Code. *Central Florida Lumber Co. v. Taylor-Moore Syndicate,* 51 F. (2d) 1, cited by the petitioner, is not in point. That was a suit to recover money which had been paid for an option. Since only a money judgment was desired and no cancellation of a written instrument was needed, it was correctly determined that the case should be transferred to the law side of the court. *Harnischfeger Sales Corp. v. National Life Ins. Co.,* 72 F. (2d) 921, does not contain the quotation indicated on page 7 of the petitioner's brief. The court in that case expressly held that equity had jurisdiction, but that a contemporaneous suit in a state court could not be stayed pending the outcome of the equity suit in the Federal Court. *Schoenthal v. Irving Trust Co.,* 287 U. S. 92, involved a separate suit in equity. In *Susquehanna S. S. Co. v. Andersen & Co.,* 239 N. Y. 285, also cited by the petitioner, the defense that the written instrument sued upon failed by a mistake to express the real intention of the parties was held to constitute an equitable defense. In *Ford v. Huff,* 296 Fed. 652, *laches* was held to be an equitable defense.

There is nothing inconsistent with the decisions below in the other case cited by the petitioner in this connection: *Petrogradsky M. K. Bank v. National City Bank,* 253 N. Y. 23.

How a judge may sit as a chancellor at a jury trial in the Pennsylvania state courts is shown by *Hile's Estate,* 310 Pa. 541, 545, and the cases there cited.

From the foregoing review of the precedents, it is respectfully submitted that the weight of them sustains the decisions of the lower courts in the case at bar and that the decisions in accord with the instant case are sound and should be followed.

There Is No Adequate Remedy at Law.

We pass now to the second reason for ratifying the construction of Section 274 (b) of the Judicial Code adopted by the courts below. That reason is that this construction is required by sound legal reasoning. There are two pertinent principles which demonstrate this. One is that equity has jurisdiction where there is no plain, adequate and complete remedy at law, and the other is that equity has jurisdiction where all of the parties necessary to a complete disposition of the controversy are not and cannot be joined at law.

One reason why there is no adequate remedy at law is that a written contract will be rescinded and ordered surrendered by equity if the complaining party was induced to enter into it by materially false representations of fact by the other party, though the latter did not know that his representations were false when he made them. At law actionable fraud requires, in addition to the falsity and materiality of the representa-

tions, proof that the assertions were made with knowledge of their falsity or in reckless disregard of the truth. In equity, on the contrary, no such proof is necessary. Equity will grant relief by way of rescission of a written contract upon proof only that one of the parties asserted what was not correct in fact and that the other party would not have entered into the contract but for those erroneous statements. *1 Black on Rescission and Cancellation* (2 Ed.), §102. *1 Story's Equity Jurisprudence* (14 Ed.), § 272. *2 Pomeroy's Equity Jurisprudence* (4 Ed.), § 885. *12 R. C. L.* 345. *26 Corpus Juris* 1181-1182. *Smith v. Richards,* 13 Pet. 26, 36. *Turner v. Ward,* 154 U. S. 618. *In re American Knit Goods Mfg. Co.,* 173 Fed. 480, 482 (C. C. A. 2). *In re New York Commercial Co.,* 228 Fed. 120, 121 (C. C. A. 2). *Taylor v. Burr Printing Co.,* 26 F. (2d) 331, 334 (C. C. A. 2). *New York Life Insurance Co. v. Marotta, supra. Kell v. Trenchard,* 142 Fed. 16, 23 (C. C. A. 4). *Manly v. Ohio Shoe Co.,* 25 F. (2d) 384, 385 (C. C. A. 4). *Halsey v. Minnesota-South Carolina L. & T. Co.,* 28 F. (2d) 720, 723 (C. C. A. 4). *Donnell v. C. R Disharoon Co.,* 32 F. (2d) 151, 153 (C. C. A. 4). *General Finance Corp. v. Keystone Credit Corp.,* 50 F. (2d) 872, 878 (C. C. A. 4); certiorari denied, 284 U. S. 684. *Hindman v. First National Bank,* 112 Fed. 931, 944 (C. C. A. 6); certiorari denied, 186 U. S. 483. *Joslyn v. Cadillac Automobile Co.,* 177 Fed. 863, 867 (C. C. A. 6). *Herschberger v. Woodrow-Parker Co.,* 275 Fed. 908, 916 (C. C. A. 6). *Independent Harvester Co. v. Tinsman,* 253 Fed. 935, 937 (C. C. A. 7). *Fay v. Hill,* 249 Fed. 415, 419 (C. C. A. 8).

In the first of the authorities just cited, it is said (p. 300):

> "An action at law for fraud in making false representations and a suit in equity for the rescission of

a contract on the ground of misrepresentations are founded on distinct theories. The former is based on an intentional deceit, which of course includes a knowledge of the falsity of what is affirmed. But the latter is aimed at the undoing of a bargain which circumstances would render it inequitable to enforce and the restoration of the parties to the *status quo*, and this may be consistent even with entire innocence and ignorance on the part of the person making the misrepresentations, or with his belief in their truth."

In the same work it is also said (p. 301):

"Hence we have the well-settled rule in equity that when rescission of a contract, deed, or other transaction is sought on the ground of misrepresentations of material matters of fact, believed in and acted upon by the party seeking relief, and resulting in his injury or prejudice, it is not necessary to show that the party making the representations knew them to be false, but he will be held responsible for their falsity, though he spoke without knowing anything about the matter, though he himself was misinformed and mistaken, and even though he actually believed in the truth of what he affirmed."

The authorities are well summarized in *12 R. C. L.* 345 as follows:

"Rule in Equity—False representations which are made with knowledge of their falsity, and with a fraudulent intent, are, of course, ground for relief in equity as well as at law. As a general rule, however, courts of equity will grant relief in such cases, by way of rescission or otherwise, even though no frauduent intent on the part of the person making the representation is shown, and though

> he made them innocently, as a result of misapprehension or mistake. All that need be shown under such circumstances is that the representations were false and actually misled the person to whom they were made."

Surely "it operates as a surprise and imposition" (to use the words of this Court in *Smith v. Richards, supra*) upon and misleads a mutual life insurance company if it is informed that an applicant has never been under observation or treatment in any hospital, has not lost weight in the last year and has not consulted or been examined or treated by any physician within the preceding five years, and then, after it has issued $20,000 worth of insurance to that applicant as a first-class risk, he dies within less than three months of cancer, from which he had been suffering for several months at least, for which he had been in one hospital within two months of his application for the insurance and in another hospital between the medical examination for and the delivery of two of the policies and for which he had consulted and been examined and treated by nine different physicians within the immediately preceding six months, to say nothing of his loss of fifteen pounds in weight during the four months preceding issuance of the policies.

There is also a very large number of decisions in accord by the State courts. They include *King v. Livingston Mfg. Co.,* 192 Ala. 269, 272; *Johnson v. Withers,* 9 Cal. A. 52, 55; *Colorado Springs Co. v. Wight,* 44 Colo. 179, 182; *Frenzel v. Miller,* 37 Ind. 1, 18; *Trimble v. Reid,* 97 Ky. 713, 718; *Hammatt v. Emerson,* 27 Me. 308, 332; *Cahill v. Applegarth,* 98 Md. 493, 503-4; *Rimer v. Dugan,* 39 Miss. 477, 483; *Peters v. Lohman,* 171 Mo. A. 465, 483; *Eibel v. Von Fell,* 55 N. J. Eq. 670, 671; *Sarson v.*

Maccia, 90 N. J. Eq. 433, 435; *Kountze v. Kennedy,* 147 N. Y. 124, 129; *Squiers v. Thompson,* 76 N. Y. S. 734, 736, 73 App. Div. 552, affirmed in 172 N. Y. 652; *McCall v. Davis,* 56 Pa. 431, 435; *Shwab v. Walters,* 147 Tenn. 638, 643; *Buchanan v. Burnett,* 102 Tex. 492, 495; *Collins v. Chipman,* 41 Tex. Civ. A. 563, 577; *Wilson v. Carpenter,* 91 Va. 183, 187, 189-190; *Tolley v. Poteet,* 62 W. Va. 231, 251; and *Smith v. Mariner,* 5 Wis. 551, 577.

Southern Development Co. v. Silva, 125 U. S. 247, cited by the petitioner, does not decide differently. The plaintiff in that case failed for want of proof that the defendant had made any false statement or that the plaintiff had relied upon what the defendant said.

Sooner or later the respondent, it is respectfully submitted, should have the right to have its defense of fraud adjudicated according to the equitable criterion enunciated in the foregoing authorities for determining whether the policies were procured by fraud. Efficiency, economy, enlightened practice and all other sound considerations, we submit, render it preferable to hold the hearing in equity in advance of the trial at law. That such is the proper order was declared by this Court in *Liberty Oil Co. v. Condon National Bank, supra.*

The petitioner seeks to escape from the inadequacy of the legal remedy shown by the group of authorities last cited because the respondent in its affidavit of defense pleads that Adamos made the answers in the application with knowledge of their falsity and fraudulently for the purpose of procuring the insurance. The petitioner overlooks the fact that the affidavit of defense had to cover the respondent's defense at law, as well as in equity. As stated by the Court in *New York Life Insurance Co. v. Marotta, supra,* the defense was both legal and equitable. At law the group of cases last cited show

that knowledge of the falsity of his statements by the party making them must be pleaded and proved. It was therefore necessary to allege in the affidavit of defense that Adamos knew that his answers were false. The respondent was justified in making those allegations because it believes them to be true. Whether Adamos knew the nature of his afflictions or not, he certainly knew that he had been in a hospital and had consulted and been examined or treated by several physicians during the six months immediately before applying for the insurance in controversy. It could not be foretold, however, whether the respondent would be able to prove such guilty knowledge, and, even if it did so, a sympathetic and prejudiced jury would probably nevertheless find against it. Simply because the affidavit of defense also pleads what is necessary to constitute a defense at law, it does not follow, as the petitioner simply assumes, that those allegations of the affidavit of defense must also be proved in the hearing according to equitable principles and practice.

Also for the purpose of showing that there is an adequate remedy at law, the petitioner refers to the provision of the policy to the effect that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties. That provision, it is submitted, is irrelevant to the issue. Even though the insured's statements be but representations, if they relate to material matters, are false in point of fact, and were an inducement but for which the respondent would not have issued the policies, all of the requisites for relief in equity are present.

It was not necessary for the respondent to plead that it is without an adequate remedy at law or that it is in need of equitable relief. The inadequacy of the

remedy at law and the need for equitable relief follow as conclusions of law from the application of the relevant legal principles to the facts of the case and are thus perceived by the Court for itself.

From what has already been said, it also follows that the defense that the applicant's answers to material questions were false and that the respondent was misled by those incorrect declarations, though the applicant may not have known of the falsity of his answers when he made them, could not be pleaded at law in bar. At law the mere falsity and materiality of the representations would not constitute a sufficient basis for relief. Knowledge by the applicant of the falsity of his answers when he made them would be a requisite additional element. The defense, in so far as it is based simply upon the falsity and materiality of the deceased's answers to the questions in the application, is therefore an equitable defense within the petitioner's own definition.

That the defense of fraud in this case is an equitable one is indicated by *Lantry v. Wallace,* 182 U. S. 536, 548-550. See also *Northern Pacific R. R. v. Paine,* 119 U. S. 561.

The illustration involving the jeweler put in the petitioner's brief (p. 22) is not apropos because a representation by such a vendor that a watch case was solid gold, 18 carat fine, would clearly constitute a warranty in the law of sales. The Uniform Sales Act, which was adopted in Pennsylvania in 1915, P. L. 543, and has been adopted by most of the other states also, provides in § 12 that "Any affirmation of fact * * * by the seller relating to the goods is an express warranty if the natural tendency of such affirmation * * * is

to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon."

Lastly, in connection with the distinction between the rules at law and in equity for determining whether such fraud exists as will vitiate a contract, the petitioner refers to the proposition that mere expressions of opinion or representations qualified by a statement that they are simply to the best of the knowledge of the party making them, do not constitute any ground for complaint either at law or in equity. There is no question about the correctness of that proposition in the abstract, but it does not apply to the facts of the case at bar. While a question to an applicant for insurance inquiring whether he has a specified disease, as the petitioner supposes in his brief (p. 23), may simply call for an honest expression of opinion, the defense to the petitioner's claim in the instant case is based in part upon questions about the answers to which there could be no difference of opinion. The questions relied upon for the defense include ones which inquire only for simple facts within the knowledge of the applicant. Thus, one of the questions involved in the case at bar is whether the applicant has ever been under observation in any hospital (R. 48, 229). Another asks what physicians, if any, the applicant has consulted or been examined or treated by within the past five years (R. 49, 230). Adamos had been in a hospital for observation and had consulted at least five doctors within approximately six months before applying for the insurance in dispute (R. 71-72, 73-76, 78-79, 84-87, 95-96, 226). These were simple facts within his knowledge, admitting of no difference of opinion: *New York Life Ins. Co. v. McCarthy,* 22 F. (2d) 241, 244. It does not help the petitioner therefore to advert to the propriety of expressions of opinion. Nor is it conceivable how it

could be material whether the false representations were made in answer to questions or not.

Another reason why the remedy at law is not adequate when the beneficiary brings suit to recover the death benefits, and the defense is that the policy is voidable on account of fraud and should be rescinded, is that all of the necessary parties to a complete disposition of the controversy are not and cannot be made parties to the action at law. The beneficiary designated in the policy is not the only person having an interest in the insurance in such a case—unless the beneficiary had paid the premiums, which is not claimed in the instant case. Here the premiums were paid by Andy Adamos (R. 122, 125-126). The petitioner certainly did not pay the premiums (R. 149). If the insurance was procured by fraud, the premiums paid by the decedent would be legally refundable to his estate and not to the beneficiary designated for the death benefits. There is no method for joining the personal representative of the decedent's estate, or other third party who may be entitled to refund of the premiums, to an action at law brought by the beneficiary of the policy against the insurer. Consequently, the remedy at law is for this reason also inadequate.

That the petitioner in this case is not the only person with an interest in the subject matter of the litigation follows as a matter of law, and therefore that legal conclusion need not be pleaded.

That the respondent in this particular case tendered the refund of the premiums to the petitioner and has not yet had Andy Adamos's estate joined as a party, should not, we respectfully submit, affect the principles of law applicable to such cases as this generally. Even if we tendered the premiums back to the wrong party, that

would not terminate the right of Andy Adamos's estate to the money to which it is lawfully entitled. Legally, therefore, there still remains a third party, namely, Andy Adamos's estate, which has an interest to the extent of $1,184.36 in the subject matter in dispute.

Whether joined in this particular case or not, the question remains whether there is not a party other than the beneficiary designated in the policy and the insurance company, who has an interest in the subject matter of a suit on a policy of life insurance alleged to have been procured by fraud. The answer to this question is clear. Unless the premiums have been paid by the beneficiary, someone else has the right to collect the premiums which must be refunded if the policy is to be rescinded because of fraud in its procurement. Since this third party cannot be joined in an action at law brought by the beneficiary to recover the face amount of the policy, a judgment in favor of the insurer in the law action brought by the beneficiary will not terminate its liability fully on account of the insurance. The company will still remain liable to someone for return of the premiums. It is respectfully submitted that this case should be decided on these principles and not go off on any narrow ground because of the nonjoinder as yet of Adamos's estate. In fact, no personal representative has yet been appointed for Adamos's estate. If this Court deems it necessary, we will attempt to raise an administration upon Adamos's estate and then apply under Equity Rule 37 for the joinder of such personal representative, or otherwise endeavor to have some representative for Adamos's estate joined to this suit. It seems, however, that the respondent alone is taking the risk by not having a necessary party joined. The applicable principles of law are not affected. There is still the same need to have a third party brought into the litigation in order that the respondent be fully dis-

charged of all liability growing out of the insurance issued on the life of Andy Adamos. From a legal standpoint, it is still true that the petitioner is not the only person having an interest in the subject matter of the litigation and a judgment in favor of the respondent on its defense in the lawsuit will not completely terminate its liability.

That equity has jurisdiction where all of the parties necessary to a complete disposition of the controversy are not and cannot be joined at law is shown by *Morgan v. Beloit,* 7 Wall. 613, 618.

For the reasons, then, that the criterion is different in equity from that at law for determining whether such fraud exists as will entitle the victim to relief and that the beneficiary designated in the policy is not the only other party besides the insurer who is interested in the subject matter and therefore necessary to a complete disposition of the controversy, it is respectfully submitted that the remedy at law in such cases as the pending one is not adequate or complete and that for this reason the construction placed by the courts below upon Section 274(b) of the Judicial Code is correct.

The construction of Section 274(b) of the Judicial Code adopted by the lower courts is also supported by the elementary proposition that fraud is one of the best recognized sources of equity jurisdiction: *Bispham's Principles of Equity* (10 Ed.) §§ 197, 200; 1 *Story's Equity Jurisprudence* (14 Ed.) § 260; *Jones v. Bolles,* 9 Wall. 364, 369.

If any authority is desired for the doctrine that the remedy at law must be in all respects equal to that in equity in order to oust the latter of jurisdiction, it is to be found in *Boyce v. Grundy,* 3 Pet. 210, 215. Here, for the reasons shown above, it is not so.

Sound Policy Supports the Decisions Below.

The third reason for construing the statute as below is that thereby a much needed improvement in the application of the law to the facts in civil cases will result. The caliber of juries is such that an insurance company, we believe, does not get a fair and impartial verdict based upon the evidence. The sympathy and prejudice of our juries almost invariably result in a verdict for the beneficiary against the company, regardless of the evidence. The petitioner, we submit, received a fair disposition of the question of fraud in this case. That beneficiaries generally will receive a fair hearing in equity in such cases is evidenced by the case of *New York Life Ins. Co. v Halpern,* 57 F. (2d) 200, affirmed in 61 F. (2d) 1037, cited by the petitioner.

Section 274(b) Is Constitutional.

If, then, the construction placed upon Section 274(b) of the Judicial Code by the decisions below in this case and by twelve Federal Judges in indistinguishable other cases is correct, it remains to determine whether, as so construed, that statutory enactment is constitutional.

That it is constitutional is established by the well settled fundamental doctrine that the constitutional guaranty of trial by jury does not apply to equity procedure: *Parsons v. Bedford et al.,* 3 Pet. 433, 446; *Barton v. Barbour,* 104 U. S. 126, 133. The defense of fraud in the procurement of a contract being an equitable one, since equitable defenses should be tried according to equitable principles and practice, and since there is no constitutional right to trial by jury in equity, an equitable issue, whether raised in an ordinary suit in

equity or introduced into an action at law under Section 274(b) of the Judicial Code, should, and may constitutionally, be tried by a chancellor alone without a jury.

That Section 274(b) is constitutional was also decided by this Court in *Liberty Oil Co. v. Condon National Bank, supra.*

II.

There Is No Jury Question.

The petitioner, it is respectfully submitted, could not have suffered any prejudicial harm by the rulings below. What the petitioner wants, of course, is to have his case decided by a jury, but even if tried before a jury, the case should be decided by the judge alone. Where the evidence preponderates so heavily in favor of one side that the trial judge would feel conscience bound to set aside a verdict for the other side as being against the manifest weight of the evidence, it is not only his right but his duty to direct a verdict for the party in whose favor the evidence so preponderates: *Pennsylvania R. R. Co. v. Chamberlain,* 288 U. S. 333. The proof of the fraud by which the insurance in litigation was procured is so clear and overwhelming, it is submitted, that the trial judge would be bound to withdraw the case from the jury and direct a verdict for the defendant. The undisputed testimony of nine physicians, all of whom had to be brought in by the defendant by subpoena, proved that the deceased was suffering from a far advanced cancer in his abdomen for several months before applying for the insurance in litigation (R. 59-107). Less than two months before applying for the insurance, the deceased was in one hospital for said disease (R. 84-85) and between de-

livery of the second and third policies he was treated in another hospital for his cancer (R. 61). Within three months after the issuance of the policies, death occurred from the aforesaid cancer (R. 226). None of this highly material medical history was revealed by Adamos when applying for the insurance (R. 48-49).

It should also be noted that until his death, Adamos represented to the Jones & Laughlin Steel Corporation, his former employer, that he was totally disabled due to the accident in 1926, thereby collecting from that company workmen's compensation for total disability until his death (R. 108-112).

A few observations in answer to the petitioner's argument on the question of fraud follow. It was the plaintiff's counsel who used the language "ignorant, dumb foreigner" (R. 70). Dr. Davison talked to Adamos in English (R. 98-99), and so did Dr. Ketterer (R. 105). No persuasion was required to induce the deceased to accept the four policies aggregating $20,000 (R. 130). The medical examiner who testified that Adamos understood the questions and that his answers are correctly recorded above his signature was not connected with the defendant at the time of the trial (R. 47). He was a reputable physician (R. 47).

The two policies last issued, and perhaps the first two also, are, furthermore, vitiated because of the nondisclosure of pertinent information when they were delivered. In *Stipcich v. Metropolitan Life Insurance Co.*, 277 U. S. 311, this Court held that an applicant for insurance must inform the insurer when delivery of a policy is tendered to him of any pertinent facts bearing on his health which have occurred between the date of his medical examination and delivery of the policy. Adamos, on account of his cancer, had been confined and

treated in a hospital and had been attended by at least four doctors between the medical examination for and delivery of the last two policies (R. 60-61, 100, 102-103, 106). None of these facts was disclosed by Adamos when the policies were delivered to him (R. 127).

The last two policies, and perhaps the first two also, are void for the additional reason that the express condition precedent to their going into effect was broken. The written provision in the policies that they should not take effect if the applicant consulted or was treated by any physician between the date of his medical examination and the delivery of the policy was unquestionably violated. Such a provision constitutes a condition precedent which is valid and will be enforced: *Bostick v. New York Life Insurance Co.*, 284 Fed. 256; *MacKelvie v. Mutual Benefit Life Insurance Co.*, 287 Fed. 660; *New York Life Insurance Co. v. Horton*, 9 F. (2d) 320; *Aetna Life Insurance Co. v. Johnson*, 13 F. (2d) 824; *Mutual Life Insurance Co. v. Tabb*, 49 F. (2d) 1019; *Subar v. New York Life Insurance Co.*, 60 F. (2d) 239; *Gill v. Mutual Life Insurance Co.*, 63 F. (2d) 967.

Since, therefore, the petitioner's case would not reach the jury even if tried before one, the petitioner has not been deprived of a trial by jury and has suffered no prejudicial harm.

So far as the legibility of the photostatic copy of the application which is attached to each policy is concerned, it is to be noted that its legibility was not questioned at the hearing and that upon the petition for a rehearing the District Court stated, "We have had no trouble in reading it, and do not think the applicant would" (R. 241).

In conclusion, it is respectfully submitted that all four policies were procured by material misrepresenta-

tion and fraud, that at least the last two policies are also vitiated by reason of the non-disclosure of pertinent information when those policies were delivered and by reason, further, of a breach of an express condition precedent, that the procedure followed by the District Court and approved by the Circuit Court of Appeals is supported by precedent, is required by the relevant legal principles and is needed for the improvement of the administration of justice in civil cases, and that in any event the petitioner has suffered no prejudicial harm. Accordingly, the decree appealed from should be affirmed.

Respectfully submitted,

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APPENDIX.

Section 274(b) of the Judicial Code (28 U. S. C. A. § 398):

Equitable defenses and equitable relief in actions at law. In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require.